Filed 1/14/19 In re Christopher D. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| In re Christopher D., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>Christopher D.,<br>Defendant and Appellant. | A150342<br><br>(Contra Costa County Super. Ct. No. J0500881) |

Appellant Christopher D. was declared a ward of the court based on a felonious act that was reclassified as a misdemeanor in the wake of Proposition 47. The juvenile court ruled that reclassification did not entitle Christopher to have his collected DNA sample and genetic profile removed from the database maintained by the California Department of Justice, and Christopher appealed, arguing that Proposition 47 requires reclassified offenses to be treated as misdemeanors for all purposes, including DNA expungement.

After briefing in this appeal was completed, we ordered the matter stayed pending our Supreme Court's decision in cases that raised the identical issue, *In re C.B.* (S237801) and *In re C.H.* (S237762). In those cases, our Supreme Court conclusively rejected the arguments that Christopher advanced on appeal and ruled that Proposition 47

does not authorize the relief that he seeks. (*In re C.B.* (2018) 6 Cal.5th 118, 122, 129-130 (*C.B.*).)

Once the Supreme Court's decision in *C.B.* became final, we lifted the stay in this appeal and ordered the parties to file supplemental briefs addressing the effect of *C.B.* on this case. In his supplemental brief, Christopher concedes that *C.B.* requires us to reject his argument that the juvenile court erred and affirm the juvenile court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [explaining the doctrine of stare decisis].)

Christopher also argues for the first time that retaining his DNA violates his right to privacy and deprives him of equal protection. Christopher did not make these claims in the trial court or in his opening or reply brief on appeal; they rest on Justice Liu's concurring opinion in *C.B.*, which notes that neither of the appellants in that case "pressed any claim that the state's retention of his DNA samples implicates a constitutionally protected privacy interest. [Citations.] Such a claim may give rise to a cause of action under the California right to privacy (see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-40) or require a more stringent equal protection analysis (see *Serrano v. Priest* (1971) 5 Cal.3d 584, 597) in a future case." (*C.B.*, *supra*, 6 Cal.5th at p. 135 (conc. opn. of Liu, J.).)

We do not address these arguments on the merits, because Christopher forfeited them by failing to raise them below. The concurring opinion in *C.B.* is not precedent and does not create a new claim for Christopher to raise at this stage of his proceedings. Even if Christopher had raised these arguments in his opening or reply briefs on appeal, we would not reach the merits because the arguments raise mixed issues of law and fact. (See, e.g., *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at pp. 39-40 [plaintiff claiming invasion of privacy must show he has a reasonable expectation of privacy in the circumstances and defendant's conduct constitutes a serious invasion of privacy, both of which are mixed issues of law and fact].) We may exercise our discretion to consider a constitutional issue that is raised for the first time on appeal "if it represents an important issue of public concern . . . and *involves only the application of*

*legal principles to undisputed facts for which the People have not been deprived of a fair opportunity to develop facts to the contrary*." (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1078, italics added.) There is no factual record before us as to Christopher's privacy claims, and accordingly the claims are not appropriate for review at this stage.

The order appealed from is affirmed.

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Miller, J.

We concur:

_____
Richman, Acting P.J.

_____
Stewart, J.

A150342, *People v. Christopher D.*